

FEB 09 2022

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No. _____

21-7512

IN THE

SUPREME COURT OF THE UNITED STATES

Kevin Herrsott

— PETITIONER

(Your Name)

Michael Stephen, et al. ^{vs.}

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals, 4th Cir.

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kevin E. Herrsott

(Your Name)

P.O. Box 8000

(Address)

Shirley, MA 01464

(City, State, Zip Code)

(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

- 1) WHETHER PETITIONER GIVE DEFENDANTS FAIR NOTICE OF WHAT THE CLAIMS ARE AND THE GROUND UPON WHICH IT RESTS?
- 2) WHERE OFFICERS VIOLATE THE RULE ANNOUNCED IN HUDSON V. McMILLIAN BY USE OF PHYSICAL EXCESSIVE FORCE ON THE PETITIONER WHO HAS PREVIOUSLY INVOKED THE EIGHTH AMENDMENT RIGHT TO PROHIBIT CRUEL AND UNUSUAL PUNISHMENT, UNDER WHAT CIRCUMSTANCES DOES FORCE IS APPLIED IN A GOOD-FAITH EFFORT TO MAINTAIN OR RESTORE DISCIPLINE AND THEREBY PURGE THE TAINT FROM THE HUDSON VIOLATION?

LIST OF PARTIES

☐ All parties appear in the caption of the case on the cover page.

☒ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Kevin E. Herriott, Petitioner
Michael Stephens, Assoc. Warden Washington, Major Parrish,
Captain Carter, Lieutenant Will, Lieutenant Vela, Sergeant
Levels, Sergeant Robinson, Corporal Mata, Officer Dunn,
Officer Mahado, Officer Coxum, Officer Campbell, Mailroom,
Officer Mitchell, John Doe 1, and John Doe 2, Defendants.

RELATED CASES

CIA No. 6:19-Cv-00750-Dew-KFM

No. 20-7176

Application No. 21 A 204

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

Hudson v. McMillian, 503 U.S. 1, 6, 112 S.Ct. 995, . . .	pg. 7-18
Hughes v. Rowe, 449 U.S. 5, 10, 101 S.Ct. 173,	pg. 15
Lindell v. Schneider, 531 F.Supp. 2d 1005,	pg. 13
West v. Atkins, 487 U.S. 42, 108 S.Ct. 2250, . . .	pg. 12
Wilson v. Seiter, 501 U.S. 294, 111 S.Ct. 2321,	pg. 12

STATUTES AND RULES

28 U.S.C.A. § 1915A

42 U.S.C.A. § 1983

OTHER

FRAP Rule 52(a)

FRCP Rule 8(a)

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was August 30, 2021.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: October 5, 2021, and a copy of the order denying rehearing appears at Appendix A.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including March 4, 2022 (date) on December 6, 2021 (date) in Application No. 21 A 204.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from state courts:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S.C.A. Const. Amend. V III provides:
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
2. United States Code Annotated Title 28 Judiciary and Judicial Procedure § 1915A provides:
 - (a) **Screening.** The Court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.
 - (b) **Grounds for dismissal.** On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint —
 - (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or
 - (2) seeks monetary relief from a defendant who is immune from such relief.
3. United States Code Annotated Title 42, The Public Health and Welfare Civil Action for Deprivation of Rights [Statutory Text & Notes of Decisions Subdivisions I to IX] § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person, within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission

3.

taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

See Attached.

STATEMENT OF THE CASE

Statement of the Case

The Petitioner Keith E. Herriott in Pro Se, is incarcerated within the Commonwealth of Massachusetts Department of Corrections, an state prisoner that has brought an 42 U.S.C. §1983, Civil Action Lawsuit Complaint against named Defendants Michael Stephen Associate Warden Washington, Major Parrish, and Captain Carter while housed in the South Carolina Department of Corrections, Broad River Prison.

The Petitioner has alleged various multiple Constitutional violations against defendants subordinates that are too, to be considered liable under §1983 such as Lieutenant Will, Lieutenant Vela, Sergeant Levels, Sergeant Robinson, Corporal Mata, Officer Dunn, Officer Malnado, Officer Coxum, Officer Campbell, Mailroom Official Mitchell, John Doe 1, and John Doe 2. The Respondents created and/or subjected the Petitioner to harsh conditions of confinement

causing irreparable harm without taking the necessary reasonable measured steps to correct or remedy the wrong-doing of their adverse conduct that has been identify as obduracy and wantonness for which is forbidden by the First, Eighth, and Fourteenth Amendments of the United States Constitution of America.

The Petitioner was housed and placed administratively within Broad River Prison, an) Level 3 maximum security restrictive housing unit (herein after RHU) after being transferred from Lee Correctional Institution. When this action was filed, the Petitioner was and still is in imminent danger, awhile acting without counsel on or before March 4, 2019.

On March 12, 2019, the lower court ordered the Petitioner to bring case into proper form because the court on its own had severance of claims the §1983 original Complaint into (3) three separate case actions. On March 22, 2019, the Petitioner brought his complaint into proper form without any errors. On April 9, 2019, the magistrate

recommended that any and all claims against defendants Warden Stephen, Captain Cates, Lieutenant Will, Mailroom Official Mitchell, Associate Warden Washington, Sergeant Robinson, Officer Campbell, John Doe 1 and John Doe 2 be dismissed with prejudice and without issuance and service of process as well as the remaining claims against Major Parrish, Sergeant Lovels, Lieutenant Vela, Officers Mata, Malindo, Dunn and Coxum outside of with respect the excessive force, and medical indifference claims had survived.

On June 13, 2019, the Petitioner objected to the magistrate court order and recommendations. On June 24, 2019, the District Court affirmed the magistrate Court's report and recommendation. The Petitioner sought an interlocutory appeal and on October 15, 2019, the appeal was dismissed.

On July 14, 2020, the District Court adopts the magistrate Court's report and recommendation granting defendants' motion for summary judgment with respect the use of excessive force, and medical indifference claims.

The Petitioner appealed the District Court's order for plain error and legal conclusions. The Court of Appeals, U.S. dismissed the appeal on August 30, 2021. The Petitioner petition for rehearing and suggestion rehearing en banc. On October 5, 2021, the U.S. Court of Appeals denied the petition for rehearing and suggestion rehearing en banc. The Petitioner now Moves before this Court upon a Federal Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

- 1) A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.
 - 2) The way the decision of the lower court in Petitioner's case was clearly erroneous.
- Also, See Attach.

- WHETHER PETITIONER GIVE DEFENDANTS FAIR NOTICE OF WHAT THE CLAIMS ARE AND THE GROUND UPON WHICH IT RESTS?

The Petitioner Kevin E. Herriott, gave the Respondents or Defendants fair notice of what the claims are and demonstrated the grounds upon which it rests.

However, the District Court dismissed the Petitioner's claims that alleged the Respondents deprived the Petitioner of out-door recreation, out-of-cell exercise, fresh-air, and sunlight exposure; the Respondents unreasonable seized the Petitioner's religious materials; the Respondents committed mail tampering, mailing interferences, and denied the Petitioner direct access to the Courts.

The Petitioner, then objected to the Court's Order for dismissal and sought a(n) interlocutory appeal, but the objection was overruled and the complaint that alleged the above listed claims dismissed. See Appendix 'A'

The Petitioner challenge whether the District Court's finding was clearly erroneous.

The U.S. District Court held what amounted to de novo review of the record which indicated that the magistrate judge's report accurately summarizes this case and applicable law. See Appendix 'A', doc. 37

According to *West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed. 2d 40 (1988), the Court held, to state a cause of action under § 1983, a plaintiff must allege facts indicating that he has been deprived of rights guaranteed by the Constitution or laws of the United States and that this deprivation resulted from conduct committed by a person acting under color of state law.

The Petitioner Statement of Claims in relevant part asserts that on or before August 1, 2018 thru November 16, 2018 named Respondents Warden Stephens, Assoc. Warden Washington, Major Parrish, Captain Carter, and Lieutenant Will are held liable under the color of state law for not permitting or deprived the Petitioner out-door recreation, out-of-cell exercise, fresh air, nor sun-light exposure violating the Petitioner's Eighth Amendment Right of the U.S. CONST. See *Wilson v. Seiter*, 501 U.S. 294, 111 S.Ct. 2321, Outdoor

exercise required when prisoners otherwise confined in small cells almost twenty-four (24) hours per day. See also, *Lindell v. Schneider*, 531 F. Supp. 2d (1005) (2008), prisoner requested for daily sunlight is well-known for being the cause of all sorts of physical and mental illnesses.

The Petitioner also pleaded facts that on July 27, 2018, the Petitioner arrived at Broad River Prison administratively and was met by Broad River Prison Restrictive Housing Unit (RHU) Officials Sergeant Robinson, Officer Campbell, John Doe 1, and John Doe 2, who had unreasonable seized ten (10) religious magazines, two (2) religious books, a pair of tennis shoes, three (3) T-Shirts, and two (2) towels without any penological interest. As result of the prison officials' conduct the Petitioner was unable to practice and study his religion during the several months at Broad River Prison.

On August 23, 2018, the Petitioner has personal knowledge that Respondents Mr. Dunn and Ms. Mitchell

did with invidious intent obstruct the Petitioner's mailing correspondence that contain testimonial documents of Lee Prison Deadly Riot in April, 2018, by taking the mail out of the R HU's mail bag, then passing the correspondences to another R HU inmate violating the Petitioner's First Amendment Right of the U.S. CONST.

On September 6, 2018, the Respondents Mr. Dunn and Ms. Mitchell did with a(n) deliberate indifference commit mail tamperance by doing a(n) hand to hand transfer after taking the legal correspondence ^{out} of the R HU's mail bag, then passing the correspondences to another R HU inmate violating the Petitioner's First Amendment Right of the U.S. CONST.

Nonetheless, the District Court's legal conclusions of law and findings of fact for clear error is plain in sight. For the Court held the Petitioner to a(n) heightened pleading at the stage of notice. The proceeding under 28 U.S.C.A. § 1915A requires the petitioner to give fair notice by **P**leading facts that allows the Court to draw the reasonable inference that each defendant is liable for the misconduct. See FRCP Rule 8(a)

Herein this case, the U.S. Court of Appeals decision and determination by a(n) opinion delivered in Per Curiam conflicts with the decision of another United States court of appeals on the same important matter.

The Petitioner directs the Court to the findings of fact by the court of appeals that held the complaint in portion be dismissed because the claims fail to plausibly state a claim for relief in which conflicts with the decision in Hughes v. Rowe, 449 U.S. 5, 10, 101 S.Ct. 173, 66 L.Ed. 2d 163 (1980).

Howbeit, in accordance to Hughes v. Rowe, supra, the court held a complaint shouldn't be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

The Petitioner asserts that the U.S. court of appeals standard of review of a factual determination duplicated the role of the lower ^{court} in applying the clearly erroneous standard to the findings of a district court sitting without a jury.

Remand is required where the U.S. Court of appeals did not consider the Petitioner's civil rights claims under appropriate "deliberate indifference" standard because it is conceivable that the Court would have reached a(n) different disposition under correct standard. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 8.

Moreover, when the Petitioner drafted his claims there is a portion in the Statement of Claims that alleged "ALL Defendants named in the complaint were deliberately indifference to a serious harm or substantial risk of serious harm to Petitioner's present and future mental and physical health when the Defendants were aware or should have been aware of the risk and failed to take corrective action."

The Petitioner asserts that had the Court of Appeals applied the correct governing standard when applying rule 52(a), FRAP to the set of facts before the Court de novo the Court would have find the District Court misapplied the deliberate indifference standard.

The reason for granting the writ are to avoid erroneous deprivations of the right to be free from cruel and unusual punishment, this Court should clarify the "initiation" standard under Hudson that applies to correctional officers when use of excessive force is applied.

In Hudson v. McMillian, 503 U.S. 1, 6, 112 S.Ct. 995, 117 L.Ed. 2d 156 (1992), this Court concluded that for purposes of establishing whether prison officials have inflicted unnecessary and wanton pain and suffering on a prisoner so as to violate the prisoner's rights under the cruel and unusual punishment clause of the Federal Constitution's Eighth Amendment, where the officials are accused of using excessive physical force, the core judicial inquiry is whether force was applied (1) in a good-faith effort to maintain or restore discipline, or (2) maliciously and sadistically to cause harm; such a standard is applicable with respect to all allegations of excessive force.

However, in *Hudson v. McMillien*, *supra*, this Court went even further to explain that in determining whether the use of force was wanton and unnecessary, it may also be proper to evaluate: (1) the need for application of force, (2) the relationship between that need and the amount of force used, (3) the threat reasonably perceived by the responsible officials, and (4) any efforts made to temper the severity of a forceful response.

But it stops short of explaining what grounds constitute as a(n) application of force meaning what circumstances does force is applied in a good-faith effort to maintain or restore discipline and thereby purge the taint from the Hudson violation: this can very well instruct the lower courts to help identify force that is physically excessive.

The Petitioner asserts that in his case the lower court applied the core judicial inquiry in whether physical force was applied, but not the standard whether force was wanton and unnecessary.

Nevertheless, the Petitioner demonstrates to the Court that at the time of the Petitioner was being physically assaulted, the Petitioner was writing the Courts and local agencies to become a(n) material witness. On the week of the 18th of March, 2021, the Petitioner went before the grand jury and testify to the events on April 15, 2018.

The named Respondents Ms. Mitchell, Mr. Parrish, Mr. Vela, and Mr. Level were trying to prevent the Petitioner to become a(n) material witness. The Petitioner informs the Court that prior to the physical assaults on August 23, 2018, the Petitioner first wrote South Carolina Solicitor's Office for the Ninth Judicial Circuit addressed to Solicitor Scarlett Wilson, but Mailroom Ms. Mitchell took the mailing legal correspondence out of the mailbag while conducting her rounds in the Saluda Unit of Broad River Prison RHM and passed the legal correspondence doing an hand to hand transfer to Mr. Dunn, who worked RHM Unit. Officer Dunn then passed the Petitioner's mailing correspondence to another

RHU inmate. The Petitioner made several request to RHU Supervisor Sergeant Smith informing Ms. Smith the Petitioner need to speak with police services because the roll around phone to place calls was out of order. The Petitioner request was denied. The Petitioner later on that day wrote Warden Stephen who did not respond to the Petitioner's request where the Petitioner asked for Police Services to interview the Petitioner.

On September 06, the day of the physical assault of force that was excessive, the Petitioner mailing correspondence was picked up by mailroom official Ms. Mitchell who placed the correspondence in RHU's mail bag. Prior to leaving the RHU Unit, Ms. Mitchell passed Mr. Dunn Mr. Herriott's legal correspondence doing an hand to hand transfer. Mr. Dunn then passed the correspondence to another RHU inmate.

This adverse act led to a(n) confrontation between the Petitioner and Mr. Dunn. The confrontation between the Petitioner and Mr. Dunn was verbal. The whole time the Petitioner

was locked behind a secure cell door. After the verbal confrontation Officer Mata came and opened the Petitioner's food flap. This occurrence of opening the food flap by Officer Mata was regular to allow fresh-air flow in the Petitioner's cell. The Petitioner used the opening of the food flap to alert Broad River Prison RHD Supervisors Captain Carter or Lieutenant Will. The request was denied when neither official came to the Petitioner's aid. After dinner was served Officers Dunn, Mahado, and Mata wanted the flap to be closed. The Petitioner refused to allow the Officers to close the food flap temporarily at least until a(n) administrator would address his serious need. According to testimonials by Respondents Mata, Dunn, and Mahado, neither testified to conflict resolution nor situation management per SCDC Policy OP-22.01, Use of Force.

According to SCDC Policy OP-22.01, under Specific Procedures: 1 Conflict Resolution / Situation Management states:

Staff members will use any reasonable actions to prevent or resolve each situation that may cause conflict, confrontation, or violence. Reasonable and preventive actions should include alternatives to the use of force, wherever possible. Alternatives to the use of force that could resolve conflict may include, but are **Not** limited to:

- Listening to and attempting to calm the inmate / counseling;
- Explaining the potential consequences of the behavior;
- Moving the inmate to a more secure location;
- Requesting additional staff;
- Requesting video tape camera and operator;
- Utilizing holding cell / control cell / strip cell; and
- Consultation with on-site or on-call mental health and/or medical staff when appropriate.

The Petitioner warns the Court that the institutional policy is according to Constitutional Standards, but the correctional staff practices at Broad River Prison are illegal as well as their customs.

Force was then applied to the Petitioner where Officer Dunn took the ram shield and ram Herriott's arm that was hanging out the food flap repeatedly. After Herriott's arm was bruised Officer Mahado reached in Petitioner's food Flap and slapped the Petitioner. The Petitioner, then bite Officer Mahado.

When a) Correctional Officer provokes a confrontation what circumstance does force is applied in a good-faith effort to maintain or restore discipline?

On or before September 18, 2018, the Petitioner was released from a) Restrictive Housing Unit to be placed in general population. The Petitioner was enroute to the general population entrance gate where the Petitioner feared for his safety and detour to the Administration Building. The Petitioner was met by Lieutenant Vela and the Petitioner inform Lieutenant Vela of the Petitioner's safety concerns. The Petitioner explained to Lieutenant Vela that the Petitioner cannot live in general population because the

Petitioner is testifying in the Petitioner's upcoming trial that took place on June 4, 2019.

The Petitioner was then escorted in Major Parrish Office accompany with Sergeant Level and Lieutenant Vela. The Petitioner addressed Major Parrish about the Petitioner's safety concerns. From the start the Petitioner had protective custody issues and the Broad River Prison Administrative failed to take corrective action. Major Parrish refused the Petitioner protective custody and a hearing to determine protective custody. The Petitioner began to plead with Major Parrish and instead of listening to the Petitioner Major Parrish gave Sergeant Level a head nod and stated, "cuff him". Major Parrish stated to the Petitioner "you are going to Waterce Unit by force."

The Petitioner stood his ground and Sergeant Level threw the cuffs on Major Parrish's desk then went for the Petitioner's upper body. Lieutenant Vela decided to go for the Petitioner's lower body. Major Parrish jumped on the Petitioner's back while the Petitioner's knees buckled and

Major Parrish, Sergeant Level, and the Petitioner crashed on the Floor while Lieutenant Veto had one leg in the air with his hands wrapped around my ankle snapping the bone. The Petitioner was then forced to stand on one leg and the Petitioner then spit in the Major's face.

What circumstance does force is applied in a good-faith effort to maintain or restore discipline?

This case presents this Court with an opportunity to clarify the Hudson's "initiation" standard in the face of correctional officers' actions that violate the Hudson rule. Absent intervention by this Court, the Fourth Circuit Court of Appeals published decision will work to undermine the carefully-crafted procedural safeguards.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

K. E. Bennett

Date: 2/2/2022